IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1104

ROGER ALLEN CARON, Petitioner

-vs-

STATE OF NORTH CAROLINA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

WILLIAM A. SMITH, JR.
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CITATIONS

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NO. _____

ROGER ALLEN CARON, Petitioner

-VS-

STATE OF NORTH CAROLINA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The Petitioner, Roger Allen Caron, respectfully prays that a Writ of Ceriorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered in this proceeding on November 6, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported in 288 N. C. 467, ____ S.E. 2d ____. The full text of the opinion appears in the Appendix of this Petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on November 5, 1975. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Is a jury charge, not requested by the Defendant, to the effect that the Defendant did not testify and that his failure to testify creates no presumption against him, constitutionally impermissable as violative of the Defendant's privilege against self-incrimination and as such a denial of due process within the meaning of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

1. **U. S. Constitution, Amendment V:**

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the due process of law; nor shall private property be taken for public use without just compensation.

2. **U. S. Constitution, Amendment XIV:**

§1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty. or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE STATUTE INVOLVED

North Carolina General Statutes, Chapter 8, Section 8-54:

Defendant in criminal action competent but not compellable to testify.—In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to incriminate himself. (1856-7, c. 23; 1866, c. 43, s. 3; 1968-9, c. 209, s. 4; 1881, c. 89, s. 3; c. 110, ss. 2, 3; Code, ss. 1353, 1354; Rev., ss. 1634, 1635; C. S., s. 1799.)

STATEMENT OF CASE

The Defendant was tried on November 18, 1974 in the Superior Court of Wake County, North Carolina on a bill of indictment alleging that he unlawfully and willfully did feloniously and wantonly set fire to and cause to be burned and did aid in the burning of a building used in carrying on the trade of an automobile paint and body shop.

The evidence for the State tended to show that the Defendant and his partner conducted a business as a paint and body shop in a leased building located in Raleigh, North Carolina and that the building was damaged by fire apparently started by a large amount of lacquer thinner spread throughout the interior of the building. The State's evidence showed that the Defendant and his partner had had a disagreement and were terminating the partnership; that the Defendant had purchased a large amount of lacquer thinner on the day prior to the fire and; that he had also increased the insurance on the building and its contents without the knowledge of his partner. While the Defendant did not testify, he offered evidence to the effect that it was his accountant that recommended an increase in the insurance and that lacquer thinner was purchased because it was in short supply because of the energy crisis at that time. After presentation of evidence by the State and by witnesses on behalf of the Defendant, the Trial Court instructed the jury as to the law pertaining to the crime of arson and during the charge, made the following statement: (R. p. 60-61)

> "You are permitted to believe all, part, or none of what any witness has had to say as you find the truth in the case requires. You will say what credit you will give to the several witnesses who have testified. You do that sort of thing. That is, you weigh matters that come to your attention continuously. You have done so all of your lives. Certainly, ever since you

> have been grown. You will continue to do so the remainder of your days. You will find it necessary to do so in order to arrive at decisions regarding your own course of action in untold instances. So, even though the Court will lay down for you no rules to circumscribe your course of action as you come to consider and weigh the evidence, even though it is your duty to lay down your own rules for accomplishing that objective - I am satisfied that you will - I certainly recommend to you that you call to your aid the sum total of the experience of the twelve of you throughout your daily walks of life when you come to say what credit you will give to the several witnesses when you come to say what weight you will give to the testimony presented when you come to say what you will or will not believe about the evidence that has been presented during the trial of the case. All of those things you have a responsibility to do. Now, when you come to weigh the evidence I am satisfied that you will recall - I mention it for a purpose because I recall that the defendant, even though he offered evidence, he did not take the stand and testify in his own behalf. Now, I make mention of that fact for this purpose. I have told you that he had no responsibility to offer any evidence, had a right to but no responsibility to; that he owed you no duty to offer any evidence; that the State had the whole burden and has the whole burden of proof throughout this case. Now that being so, he had an absolute right under the law to try his lawsuit in the fashion that he decided that it ought to be tried. He had a right to offer no evidence. If he offered any, he had a right to remain off the stand. You can't punish any man for exercising a lawful right. So I give emphasis

to this fact: The fact that the defendant did not testify does not permit you to speculate about why he did not. I have told you why he did not. He has exercised a lawful right. You may not take the position during your deliberations did he have something he didn't want us to know. He has exercised a lawful right and you may not hold it against him to any extent the fact that he did not testify. You must deal with what you have before you in this evidence and you may not hold against the defendant a'tall the fact that he did not testify."

Following the presentation of the charge to the jury, the jury retired and returned with a verdict of guilty as charged - that is feloniously setting fire to a building used as a business. The judgment was entered that the Petitioner receive an active term of imprisonment for four years.

Petitioner entered appropriate exceptions and appealed to the North Carolina Court of Appeals assigning as error, among other things, that the Trial Court committed error in its instructions to the jury as it pertained to the Petitioner not testifying. By opinion filed by the North Carolina Court of Appeals on July 2, 1975, with all Judges concurring, that Court found no error and affirmed the Petitioner's conviction. Thereupon, the Petitioner filed a Petition for Certiorari to the North Carolina Supreme Court which was allowed August 25, 1975. This Petition cited as error that portion of the charge pertaining to the Defendant's failure to testify. (R. p. 69) By opinion filed November 5, 1975, the Supreme Court of North Carolina found no error and by majority opinion, affirmed the Petitioner's conviction.

REASON FOR GRANTING THE WRIT

Review of the question pertaining to the properity of the Trial Court to comment to the Defendant's failure to testify is important because:

1. The comment of the Trial Court in this case in effect denied the Defendant his constitutional right to remain silent.

2. The opinion of the North Carolina Supreme Court is contrary to the opinions of a number of its sister states.

3. The opinion appears to be contrary to a prior holding of the United States Supreme Court in the case of Griffin v California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106

Review of this question is most important since the North Carolina Courts do not prescribe any mandatory formula for the Trial Court to follow in situations where the Defendant does not choose to testify and either does not request an instruction or specifically requests that no instruction be given. Instead, the North Carolina Supreme Court has admonished its Courts as follows: "It is better to give no instruction concerning the failure of the Defendant to testify unless he requests it". State v. Bryant, 283 N.C. 227, 195 S.E. 2d, 509. Such admonition was not followed in this case. The North Carolina Supreme Court depends upon its Trial Courts to follow the spirit of the North Carolina General Statute 8-54 which states in part "In the trial of all indictments, complaints or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is at his own request, but not otherwise, a competent witness, **and his failure to make such request shall not create any presumption against him . . .**". Furthermore, in its opinion, the North Carolina Supreme Court, by majority, did not commend the instruction given in this case as the instruction appeared to be unduly repetitious. However, the majority held that the instruction was not prejudicial and found that the instruction stripped of unnecessary verbage; the Court instructed the jury that the Defendant may or may not testify in his own behalf as he sees fit, and that his

failure to testify shall not be held against him to any extent. The dissenting view of the Court, however, indicated that the conclusion of the majority ignored the fact "That certain medicines taken in small doses may effect a cure, while a large dose of the same medicine, or a small one indiscriminately repeated, can be fatal."

Review of this question is important to the criminal processes in North Carolina and to the other states since any instruction of this type has the effect of emphasizing the Defendant's silence which emphasis could lead to an improper inference thus in effect denying one charged his Fifth Amendment right to remain silent. Similar instructions under like circumstances are not allowed in California (People v Molano, 253 Cal App 2d -, 61 Cal Rptr 821, 18 ALR3d 1328), Arkansas (Russell v State, 240 Ark 97, 398 SW2d 213), and Arizona (State v Zaragosa, 6 Ariz App 80, 430 P2d 426).

This Court has held in the case of Griffin v. California, 380 U. S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106, that either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt is constitutionally barred. Thus, a review by this Court to determine if the instruction was tantamount to giving a comment of the type proscribed by Griffin might well indicate that the Defendant was deprived of a fair trial.

CONCLUSIONS

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of North Carolina.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF NORTH CAROLINA
FALL TERM 1975

STATE OF NORTH CAROLINA
v. No. 68 - Wake
ROGER ALLEN CARON

On **certiorari** to review the decision of the Court of Appeals, reported in 26 N. C. App. 456, 215 S.E. 2d 878 (1975), which found no error in the trial before Godwin, S.J., at the 18 November 1974 Session, Wake Superior Court.

Defendant was tried and convicted on a charge of feloniously setting fire to a building used as a business, in violation of G.S. 14-62. The building housed a body and paint shop operated by defendant and was unoccupied at the time of the fire. From judgment imposing an active prison sentence, defendant appealed. The Court of Appeals found no error in the trial. We allowed **certiorari** on 25 August 1975.

Facts necessary to decision are fully set out in the opinion.

Attorney General RUFUS L. EDMISTEN by Special Deputy Attorney General WILLIAM F. O'CONNELL and Associate Attorney ROBERT R. REILLY, for the State.

WILLIAM A. SMITH, JR., for defendant appelant.

MOORE, Justice.

Defendant first assigns as error the denial of his motions for judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence. It is elementary that a motion to nonsuit requires the trial court to consider the evidence in its light most favorable to the State, take it as true, and give the

State the benefit of every reasonable inference to be drawn therefrom. State v. Goines, 273 N.C. 509, 160 S.E. 2d 469 (1968), and cases cited therein. Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. State v. Cooke, 278 N. C. 288, 179 S.E. 2d 365 (1971); State v. Goines, **supra**.

The evidence for the State tends to show: On 22 January 1974 at approximately 4:00 a.m., the Raleigh Fire Department responded to a fire at Caron Body Shop located at 705 North Person Street. Upon extinguishing the blaze, Raleigh Fire Chief S. J. Talton entered the building and immediately sensed the heavy odor of lacquer thinner. From his examination of the building, he estimated that the fire began forty-five minutes to an hour before his arrival. He termed the blaze a "flash over" fire, that is, a very hot fire that will not burn long because it lacks the necessary oxygen for the amount of fuel in the building.

Further testimony by Chief Talton tends to show the following: The fire started in the northeast corner of the building and flashed across to the southwest corner. The second window from the northeast corner of the building had been broken and glass had fallen on the inside of the building. The floor sloped downward from the northeast corner to the southwest corner with a drop of three to four inches from the center of the building to the southwest corner. A fifty-five gallon drum of lacquer thinner was found on a stand in the center of the building, approximately one-third full. The right leg of the stand was broken and marks were on the leg. The drum was on its side with the spout on the face of the drum so situated that it did not touch the floor. The spout was ruptured where it screwed into the barrel and was dented on the left side. There was so much lacquer thinner on the floor that it had to be

washed out.

The floor was dirty except for a clean swath about a foot and a half wide where there had been a swirling fire, apparently as a result of burned-off lacquer thinner. This clean trail led from the door back to the drum and from the door over to the window. It circled around the window, went between the cars in the shop and came back to the door. The floor area around the fifty-five gallon drum was also clean.

Chief Talton further testified that "a person would be dead if he stood inside and set the fire. He could not have survived the explosion."

Defendant arrived at the scene approximately thirty minutes after being called at his home and informed of the fire. Chief Talton testified:

> ". . . When I saw him, I had reason to believe that the fire had been intentionally set. When Mr. Caron drove up, he was dirty which is natural for a working man, but he was smutty looking and had soot coming out of the corner of his nose and up and around about a half inch over his nose. I noticed smut on his clothes, on his face and hands. He was dressed in work clothes. It was not a clean uniform. I am sure that I saw the smut and not grease or oil."

Officer R. B. Tant took a statement from defendant on the afternoon of 23 January 1974 as part of his normal investigation of the fire. Defendant was not a suspect at this time, but was interviewed because he owned the body shop. Defendant told Tant that on the night of the fire he left the building at approximately 7:10 p.m., naming several persons who were at the building when he left. He added that he had two insurance policies on his business--a $20,000 policy on the contents of the building and a $5,000 policy covering up to five vehicles in the building. Defendant admitted, "I can't explain why there was soot on my face when I got back to the fire."

On the evening of 23 January, defendant called Officer Tant, informed him that his earlier statement was not correct and that he wanted to change it. Thereafter, on 25 January 1975, defendant told Tant that he returned to the body shop after the late movie on television for the purpose of working on a car there but only stayed twenty to thirty minutes, that he left the shop around 2:30 a.m., stopped for a doughnut and coffee, and returned home at approximately 3:00 a.m.

The State's evidence concerning the prior business history of the body shop tends to show that on 9 August 1973 defendant formed a partnership with Charles Edward Caudle and an $8,000 fire insurance policy was placed in the name of both men, doing business as "C and C Body Shop." On 3 January 1974, following some disagreement between Caron and Caudle, the policies were placed back in defendant's name, doing business as "Caron Body Shop." At this time the amount of fire insurance was increased from $8,000 to $20,000 without Caudle's knowledge. Caudle's personal boat was in the building at the time of the fire and was destroyed.

Caudle testified that Caron purchased a fifty-five gallon drum of lacquer thinner on the day before the fire. He built a stand for it which Caudle believed needed bracing but the defendant said the drum would not fall. At that time there was another fifty-five gallon drum of lacquer thinner in the building which had approximately thirty gallons left in it after three or four months use.

Defendant offered evidence that his wife had loaned him the money to finance his business. Further evidence for the defendant tended to show that he was habitually dirty because of the nature of his job in the body shop, that a shortage of lacquer thinner existed at the time he bought the fifty-five gallon drum, and that the increase in insurance coverage had been initiated through a recommendation of his accountant. Defendant did not testify.

Taking this evidence in the light most favorable to the State, it was sufficient to take the case to the jury on all elements of the crime charged. The building falls within the definition of the statute. Substantial evidence shows that the origin of the fire was incendiary or felonious in nature. Defendant's own admission as to his presence in the body shop shortly before the fire began, his lack of an explanation for the soot on his face and clothes, and the totality of the circumstances surrounding the fire, inexorably connects defendant with the crime. **See** State v. Thomas, 241 N. C. 337, 85 S.E. 2d 300 (1955), State v. Cuthrell, 233 N. C. 274, 63 S.E. 2d 549 (1951), State v. Anderson, 228 N. C. 720, 47 S. E. 2d 1 (1948). The motions for nonsuit were properly denied.

Defendant's remaining assignment of error challenges the court's instruction to the jury concerning defendant's failure to testify. The court charged as follows:

"... I recall that the defendant, even though he offered evidence, he did not take the stand and testify in his own behalf. Now, I make mention of that fact for this purpose. I have told you that he had no responsibility to offer any evidence, had a right to but no responsibility to; that he owed you no duty to offer any evidence; that the State had the whole burden and has the whole burden of proof throughout this case. Now that being so, he had an absolute right under the law to try his lawsuit in the fashion that he decided that it ought to be tried. He had a right to offer no evidence. If he offered any, he had a right to remain off the stand. You can't punish any man for exercising a lawful right. So I give emphasis to this fact: The fact that the defendant did not testify does not permit you to speculate about why he did not. I have told you

why he did not. He has exercised a lawful right. You may not take the position during your deliberations did he have something he didn't want us to know. He has exercised the lawful right and you may not hold it against him to any extent the fact that he did not testify. You must deal with what you have before you in this evidence and you may not hold against the defendant a'tall the fact that he did not testify."

The question is: Did the court violate G.S. 8-54 in so charging the jury, no request for such charge having been made by defendant? G.S. 8-54 provides, in part:

"In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him . . . ."

Under this statute, the judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him unless defendant so requests. State v. Baxter, 285 N. C. 735, 208 S.E. 2d 696 (1974),; State v. Bryant, 283 N. C. 227, 195 S.E. 2d 509 (1973); State v. Rainey, 236 N. C. 738, 74 S.E. 2d 39 (1953); 3 Strong, N. C. Index 2d, Criminal law §116. **See** Annot., 18 A.L.R. 3d 1335, 1337 (1968).

Chief Justice Bobbitt, speaking for the Court in State v. Barbour, 278 N. C. 449, 180 S.E. 2d 115 (1971), **cert. den.**, 404 U. S. 1023, 30 L.Ed. 2d 673, 92 S.Ct. 699 (1972), said:

"Defendant assigns as error the court's instructions to the effect that defendant's failure to testify was not to be considered against him. Although the instruction is meager and is not commended, we are constrained to hold that it meets minimum requirements. Ordinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by defendant. (Citation ommitted.)"

Our cases do not prescribe any mandatory formula but instead look to see if the spirit of G.S. 8-54 has been complied with. State v. Sanders, 288 N. C. 285,____ S.E.2d ____(1975), State v. Paige, 272 N. C. 417, 158 S.E. 2 522 (1968; State v. McNeill, 229 N. C. 377, 49 S.E. 2d 733 (1948); State v. Proctor, 213 N. C. 221, 105 S.E. 816 (1938).

Justice Lake, speaking for the Court in State v. Baxter, **supra**, stated the general rule that ". . . any instruction thereon is incomplete and prejudicially erroneous unless it makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him. . . ."

In this connection we empnasize what we said in State v.McNeill, **supra:**

". . .(T)he failure of a defendant to go upon the witness stand and testify in his own behalf should not be made the subject of comment, except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and his failure to testify 'shall not create any presumption against him.' G.S., 8-54."

In fact, some jurisdictions, contrary to our decisions, hold that unless the defendant so requests, such an instruction tends to accentuate the significance of his silence and this impinges upon defendant's unfettered right to testify or not to testify at his option. **See** Annot., 18 A.L.R. 3d 1335 (1968); Griffin v. California, 380 U. S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229 (1965).

We do not commend the instruction given in the present case as it was unduly repetitious. However, we hold that the instruction was not prejudicial. Stripped of unnecessary verbiage, the court instructed the jury that a defendant may or may not testify in his own behalf as he sees fit, and that his failure to testify shall not be held against him to any extent. We think that this instruction meets the requirements of G.S. 8-54. This assignment is overruled.

Defendant having failed to show prejudicial error, the decision of the Court of Appeals is affirmed.

Affirmed.

SHARP, CHIEF JUSTICE, dissenting:

In my view the trial judge's instructions to the jury on defendant's failure to testify thwarted the purpose of G.S. 8-54, and entitle defendant to a new trial. The instructions disregard this Court's repeated admonition that "it is better to give **no instruction** concerning failure of defendant to testify unless he requests it." State v. Bryant, 283 N. C. 227, 195 S.E. 2d 509 (1973); **see, inter alia**, State v. Barbour, 278 N. C. 449, 180 S.E.2d 115 (1971); State v. Jordan, 216 N. C. 356, 6 S.E.2d 156 (1939). The instruction also ignored and violated the Court's warning to the trial judges that "the failure of a defendant to go upon the witness stand and testify in his own behalf should not be made the subject of comment, except to inform the jury that a

defendant may or may not testify in his own behalf as he may see fit, and his failure to testify 'shall not create any presumptions against him.' G.S. 8-54." State v. McNeill, 229 N. C. 377, 49 S.E.2d 733 (1948).

The majority concede the challenged instruction was unduly repetitious and not to be commended but hold that its repetitiveness was not prejudicial. This conclusion ignores the fact that certain medicines taken in small doses may effect a cure while a large dose of the same medicine, or a small one indiscriminately repeated, can be fatal. I also believe the majority discounts the effect of the judge's gratuitous instruction that the jury must not speculate why defendant did not take the stand or take the position that because he did not testify he had something to hide. To prohibit this thought was to suggest it. In addition, it would appear that the majority attaches no significance to the manner in which the judge prefaced the instruction, that is, ". . **.I recall** that the defendant, even though he offered no evidence, he did not take the stand and testify in his own behalf." (Emphasis added.)

I believe the judge did defendant a disfavor by emphasizing his failure to testify and that it deepened "an impression which is perhaps hardly ever removed by an instruction which requires a sort of mechanical control of thinking in the face of a strong natural inference." State v. Jordan, **supra** at 366, 5 S.E. 2d at 161. For the reasons stated I vote for a new trial.

Justice Exum joins in this dissent.

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-vs-

STATE OF NORTH CAROLINA, Respondent

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA SUPREME COURT

ANSWER OF RESPONDENT STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported in 288 N. C. 467, 219 S. E. 2d 68 (1975). The full text of the opinion appears in the Appendix of this Answer.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Is a jury charge, not requested by the defendant, to the effect that the defendant did not testify and that his failure to testify creates no presumption against him, constitutionally impermissible as violative of the defendant's privilege against self-incrimination and as such a denial of due process within the meaning of the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina General Statutes:

§ 8-54. *Defendant in criminal action competent but not compellable to testify* -- In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense,

competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to incriminate himself. (1856-7, c. 23; 1866, c. 43, s. 3; 1868-9, C. 209, s. 4; 1881, c. 89, s. 3; c. 110, ss. 2, 3; Code, ss. 1353, 1354; Rev., ss. 1634, 1635; C. S., s. 1799.)

STATEMENT OF THE CASE

The Respondent accepts and adopts the Statement of the Case set forth in the Petition.

ARGUMENT

A JURY CHARGE, NOT REQUESTED BY THE DEFENDANT, TO THE EFFECT THAT THE DEFENDANT DID NOT TESTIFY AND THAT HIS FAILURE TO TESTIFY CREATES NO PRESUMPTION AGAINST HIM, IS CONSTITUTIONALLY PERMISSIBLE.

In *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), this Court held that the trial court's instruction that the jury may draw an inference of guilt from the defendant's failure to testify as to facts peculiarly within the accused's knowledge violated the defendant's Fifth Amendment right against self-incrimination. This Court stated that "It is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify." (at 613); and "What the jury may infer, given no help from the Court, is one thing. What it may infer when the Court solemnizes the silence of the accused in the evidence *against him* is quite another." (at 614) (Emphasis supplied)

In *Griffin, supra*, this Court found impermissible a trial court's instruction that the defendant's silence was an inference of guilt. Herein, the defendant relies on the same case to argue that the trial court's instruction that the jury may not penalize the defendant for the exercise of a constitutional right violated the very same constitutional right. The holding of *Griffin, supra*, is inapplicable, if not contrary, to defendant's argument. This Court struck down a "penalty imposed by courts for exercising a constitutional privilege"; this Court did not thereby

infer that a court's explanation of a constitutional right impinged that same constitutional right.

An annotation in 18 A.L.R. 3rd 1335 cites authority for both the position of the Petitioner and that of the Respondent. Although a few state court decisions support the Petitioner's position, federal court of appeal decisions appear to be uniformly in support of the Respondent's position. See *United States v. Houston*, 434 F. 2d 613 (1970), *Locklear v. United States*, 393 F. 2d 729 (1968), *United States v. Jones*, 406 F. 2d 1297 (1969), *Sullivan v. Scafati*, 428 F. 2d 1023, cert den 400 U.S. 1001, 91 S. Ct. 478, 27 L. Ed. 2d 452 (1970) (wherein the instruction, without request therefor, was determined to be not error); *United States v. Slaton*, 430 F. 2d 1109, cert den 400 U.S. 997, 91 S.Ct. 475, 27 L. Ed. 2d 448 (1970) (wherein the instruction, given over an objection, was determined to be not error); and *United States v. Gobel*, 512 F. 2d 458 (1975) (wherein the instruction, given at the request of one co-defendant but over the objection of the other co-defendant, was determined to be not error).

The trial court in North Carolina has been entrusted with discretion to regulate the proceeding before it so as to insure the administration of justice. The Supreme Court of North Carolina, although it has opined that it is preferable that no instruction be given on the defendant's failure to testify unless the defendant so requests, has preserved a limited discretion in the trial court to instruct concerning the import of G.S. 8-54. This limited discretion enables the trial court, cognizant of the mood of the trial, to determine if the instruction is necessary to insure that the verdict rendered is the result of the application of the law to the facts and not the whims or prejudices of the jury. The Fifth and Fourteenth Amendments of the United States Constitution do not prohibit the exercise of such discretion. Conversely, elimination of such discretion by a few state courts does not present a question of significant constitutional interest.

CONCLUSION

For the reasons stated above, the respondent respectfully prays that this Court deny the petition.

This the 20th day of April, 1976.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I served three copies of the foregoing Answer to Petition for a Writ of Certiorari to the North Carolina Supreme Court on William A. Smith, Jr., Attorney for Petitioner, 907 Branch Bank and Trust Building, Raleigh, North Carolina 27602 (which is less than 500 miles from the undersigned) by depositing the same in the U. S. mail, first class postage prepaid, this the 20th day of April, 1976.

All parties required to be served have been served.

William F. O'Connell

APPENDIX

SUPREME COURT OF NORTH CAROLINA
FALL TERM 1975

STATE OF NORTH CAROLINA
v. No. 68-Wake
ROGER ALLEN CARON

On *certiorari* to review the decision of the Court of Appeals, reported in 26 N.C. App. 456, 215 S.E. 2d 878 (1975), which found no error in the trial before Godwin, S.J., at the 18 November 1974 Session, Wake Superior Court.

Defendant was tried and convicted on a charge of feloniously setting fire to a building used as a business in violation of G.S. 14-62. The building housed a body and paint shop operated by defendant and was unoccupied at the time of the fire. From judgment imposing an active prison sentence, defendant appealed. The Court of Appeals found no error in the trial. We allowed *certiorari* on 25 August 1975.

Facts necessary to decision are fully set out in the opinion.

Attorney General RUFUS L. EDMISTEN by Special Deputy Attorney General WILLIAM F. O'CONNELL and Associate Attorney ROBERT R. REILLY, for the State.

WILLIAM A. SMITH, JR., for defendant appellant.

MOORE, Justice.

Defendant first assigns as error the denial of his motions for judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence. It is elementary that a motion to nonsuit requires the trial court to consider the evidence in its light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968), and cases cited therein. Regardless of whether the evidence is direct, circumstantial, or

both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. *State v. Cooke*, 278 N.C. 288, 179 S.E. 2d 365 (1971); *State v. Goines*, *supra*.

The evidence for the State tends to show: On 22 January 1974 at approximately 4:00 a.m., the Raleigh Fire Department responded to a fire at Caron Body Shop located at 705 North Person Street. Upon extinguishing the blaze, Raleigh Fire Chief S. J. Talton entered the building and immediately sensed the heavy odor of lacquer thinner. From his examination of the building, he estimated that the fire began forty-five minutes to an hour before his arrival. He termed the blaze a "flash over" fire, that is, a very hot fire that will not burn long because it lacks the necessary oxygen for the amount of fuel in the building.

Further testimony by Chief Talton tends to show the following: The fire started in the northeast corner of the building and flashed across to the southwest corner. The second window from the northeast corner of the building and been broken and glass had fallen on the inside of the building. The floor sloped downward from the northeast corner to the southwest corner with a drop of three to four inches from the center of the building to the southwest corner. A fifty-five gallon drum of lacquer thinner was found on a stand in the center of the building, approximately one-third full. The right leg of the stand was broken and marks were on the leg. The drum was on its side with the spout on the face of the drum so situated that it did not touch the floor. The spout was ruptured where it screwed into the barrel and was dented on the left side. There was so much lacquer thinner on the floor that it had to be washed out.

The floor was dirty except for a clean swath about a foot and a half wide where there had been a swirling fire, apparently as a result of burned-off lacquer thinner. This clean trail led from the door back to the drum and from the door over to the window. It circled around the window, went between the cars in the shop and came back to the door. The floor area around the fifty-five gallon drum was also clean.

Chief Talton further testified that "a person would be dead if he stood inside and set the fire. He could not have survived the explosion."

Defendant arrived at the scene approximately thirty minutes after being called at his home and informed of the fire. Chief Talton testified:

> "...When I saw him, I had reason to believe that the fire had been intentionally set. When Mr. Caron drove up, he was dirty which is natural for a working man, but he was smutty looking and had soot coming out of the corner of his nose and up and around about a half inch over his nose. I notice smut on his clothes, on his face and hands. He was dressed in work clothes. It was not a clean uniform. I am sure that I saw the smut and not grease or oil."

Officer R. B. Tant took a statement from defendant on the afternoon of 23 January 1974 as part of his normal investigation of the fire. Defendant was not a suspect at this time, but was interviewed because he owned the body shop. Defendant told Tant that on the night of the fire he left the building at approximately 7:10 p.m., naming several persons who were at the building when he left. He added that he had two insurance policies on his business–a $20,000 policy on the contents of the building and a $5,000 policy covering up to five vehicles in the building. Defendant admitted, "I can't explain why there was soot on my face when I got back to the fire."

On the evening of 23 January, defendant called Officer Tant, informed him that his earlier statement was not correct and that he wanted to change it. Thereafter, on 25 January 1975, defendant told Tant that he returned to the body shop after the late movie on television for the purpose of working on a car there but only stayed twenty to thirty minutes, that he left the shop around 2:30 a.m., stopped for a doughnut and coffee, and returned home at approximately 3:00 a.m.

The State's evidence concerning the prior business history of the body shop tends to show that on 9 August 1973

defendant formed a partnership with Charles Edward Caudle and an $8,000 fire insurance policy was placed in the name of both men, doing business as "C and C Body Shop." On 3 January 1974, following some disagreement between Caron and Caudle, the policies were placed back in defendant's name, doing business as "Caron Body Shop." At this time the amount of fire insurance was increased from $8,000 to $20,000 without Caudle's knowledge. Caudle's personal boat was in the building at the time of the fire and was destroyed.

Caudle testified that Caron purchased a fifty-five gallon drum of lacquer thinner on the day before the fire. He built a stand for it which Caudle believed needed bracing but the defendant said the drum would not fall. At that time there was another fifty-five gallon drum of lacquer thinner in the building which had approximately thirty gallons left in it after three or four months use.

Defendant offered evidence that his wife had loaned him the money to finance his business. Further evidence for the defendant tended to show that he was habitually dirty because of the nature of his job in the body shop, that a shortage of lacquer thinner existed at the time he bought the fifty-five gallon drum, and that the increase in insurance coverage had been initiated through a recommendation of his accountant. Defendant did not testify.

Taking this evidence in the light most favorable to the State, it was sufficient to take the case to the jury on all elements of the crime charged. The building falls within the definition of the statute. Substantial evidence shows that the origin of the fire was incendiary or felonious in nature. Defendant's own admission as to his presence in the body shop shortly before the fire began, his lack of an explanation for the soot on his face and clothes, and the totality of the circumstances surrounding the fire, inexorably connects defendant with the crime. See *State v. Thomas*, 241 N.C. 337, 85 S.E. 2d 300 (1955), *State v. Cuthrell*, 233 N.C. 274, 63 S.E. 2d 549 (1951), *State v. Anderson*, 228 N.C. 720, 47 S.E. 2d 1 (1948). The motions for nonsuit were properly denied.

Defendant's remaining assignment of error challenges the court's instruction to the jury concerning defendant's failure to testify. The court charged as follows:

"...I recall that the defendant, even though he offered evidence, he did not take the stand and testify in his own behalf. Now, I make mention of that fact for this purpose. I have told you that he had no responsibility to offer any evidence, had a right to but no responsibility to; that he owed you no duty to offer any evidence; that the State had the whole burden and has the whole burden of proof throughout this case. Now that being so, he had an absolute right under the law to try his lawsuit in the fashion that he decided that it ought to be tried. He had a right to offer no evidence. If he offered any, he had a right to remain off the stand. You can't punish any man for exercising a lawful right. So I give emphasis to this fact: The fact that the defendant did not testify does not permit you to speculate about why he did not. I have told you why he did not. He has exercised a lawful right. You may not take the position during your deliberations did he have something he didn't want us to know. He has exercised the lawful right and you may not hold it against him to any extent the fact that he did not testify. You must deal with what you have before you in this evidence and you may not hold against the defendant a'tall the fact that he did not testify."

The question is: Did the court violate G.S. 8-54 in so charging the jury, no request for such charge having been made by defendant? G.S. 8-54 provides, in part:

> "In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him...."

Under this statute, the judge is not required to instruct the jury that a defendant's failure to testify creates no

presumption against him unless defendant so requests. *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974); *State v. Bryant*, 283 N.C. 227, 195 S.E. 2d 509 (1973); *State v. Rainey*, 236 N.C. 738, 74 S.E. 2d 39 (1953); 3 *Strong*, N.C. Index 2d, Criminal law §116. See *Annot.*, 18 A.L.R. 3d 1335, 1337 (1968).

Chief Justice Bobbitt, speaking for the Court in *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971), *cert. den.*, 404 U.S. 1023, 30 L.Ed 2d 673, 92 S.Ct. 699 (1972), said:

> "Defendant assigns as error the court's instructions to the effect that defendant's failure to testify was not to be considered against him. Although the instruction is meager and is not commended, we are constrained to hold that it meets minimum requirements. Ordinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by defendant. (Citation ommitted.)"

Our cases do not prescribe any mandatory formula but instead look to see if the spirit of G.S. 8-54 has been complied with. *State v. Sanders*, 288 N. C. 285, _____ S.E. 2d _____ (1975), *State v. Paige*, 272 N. C. 417, 158 S.E. 2d 522 (1968); *State v. McNeill*, 229 N. C. 377, 49 S.E. 2d 733 (1948); *State v. Proctor*, 213 N. C. 221, 105 S.E. 816 (1938).

Justice Lake, speaking for the Court in *State v. Baxter, supra*, stated the general rule that "...any instruction thereon is incomplete and prejudicially erroneous unless it makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him...."

In this connection we emphasize what we said in *State v. McNeill, supra*:

> "...(T)he failure of a defendant to go upon the witness stand and testify in his own behalf should not be made the subject of comment, except to

> inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and his failure to testify 'shall not create any presumption against him.' G.S. 8-54."

In fact, some jurisdictions, contrary to our decisions, hold that unless the defendant so requests, such an instruction tends to accentuate the significance of his silence and this impinges upon defendant's unfettered right to testify or not to testify at his option. See *Annot.*, 18 A.L.R. 3d 1335 (1968); *Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229 (1965).

We do not commend the instruction given in the present case as it was unduly repetitious. However, we hold that the instruction was not prejudicial. Stripped of unnecessary verbiage, the court instructed the jury that a defendant may or may not testify in his own behalf as he sees fit, and that his failure to testify shall not be held against him to any extent. We think that this instruction meets the requirements of G.S. 8-54. This assignment is overruled.

Defendant having failed to show prejudicial error, the decision of the Court of Appeals is affirmed.

Affirmed.

SHARP, CHIEF JUSTICE, dissenting:

In my view the trial judge's instructions to the jury on defendant's failure to testify thwarted the purpose of G.S. 8-54, and entitle defendant to a new trial. The instructions disregard this Court's repeated admonition that "it is better to give *no instruction* concerning failure of defendant to testify unless he requests it." *State v. Bryant*, 283 N. C. 227, 195 S.E. 2d 509 (1973); *see, inter alia*, *State v. Barbour*, 278 N. C. 449, 180 S.E.2d 115 (1971); *State v. Jordan*, 216 N. C. 356, 6 S.E.2d 156 (1939). The instruction also ignored and violated the Court's warning to the trial judges that "the failure of a defendant to go upon the witness stand and testify in his own behalf should not be made the subject of comment, except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and his failure to testify 'shall not create any presumptions against him.' G.S. 8-54."

State v. McNeill, 229 N.C. 377, 49 S.E. 2d 733 (1948).

The majority concede the challenged instruction was unduly repetitious and not to be commended but hold that its repetitiveness was not prejudicial. This conclusion ignores the fact that certain medicines taken in small doses may effect a cure while a large dose of the same medicine, or a small one indiscriminately repeated, can be fatal. I also believe the majority discounts the effect of the judge's gratuitous instruction that the jury must not speculate why defendant did not take the stand or take the position that because he did not testify he had something to hide. To prohibit this thought was to suggest it. In addition, it would appear that the majority attaches no significance to the manner in which the judge prefaced the instruction, that is, "...*I recall* that the defendant, even though he offered no evidence, he did not take the stand and testify in his own behalf." (Emphasis added.)

I believe the judge did defendant a disfavor by emphasizing his failure to testify and that it deepened "an impression which is perhaps hardly ever removed by an instruction which requires a sort of mechanical control of thinking in the face of a strong natural inference." *State v. Jordan, supra*, at 366, 5 S.E. 2d at 161. For the reasons stated I vote for a new trial.

Justice Exum joins in this dissent.